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No. 88-1425

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1988

TOWNSHIP OF PLYMOUTH,

*Petitioner*,

*v.*

COUNTY OF MONTGOMERY,

*Respondent*.

## ON PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

## BRIEF FOR RESPONDENT

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## COUNTERSTATEMENT OF QUESTION PRESENTED

Are the due process rights of a civil litigant abridged where an appellate court affirms by relying in part on grounds other than those stated by the trial court, and where all of the appellate court's grounds are premised upon facts which were determined by the trial court following a full and fair adversarial hearing?

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COUNTY OF MONTGOMERY,

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

### I. COUNTERSTATEMENT OF THE CASE

The instant Petition for Certiorari is only the latest in a series of dilatory tactics by petitioner Plymouth Township ("the Township") which are designed to frustrate development of a state-of-the-art waste-to-energy facility by respondent County of Montgomery ("the County") in a heavily industrialized area of the Township. Petitioner has instigated at least three separate and — thus far — uniformly futile actions to prevent construction of the desperately needed County facility. The Township has pursued virtually every step available to it in the appellate

process, including applications for reconsideration upon receiving notice of appellate defeats. Even the timing and substance of the Township's current Petition, filed on the 87th day after the Supreme Court of Pennsylvania refused to reconsider its denial of allocatur,[1] demonstrates that petitioner — which is aware that the County's tax-exempt financing for the project hinges upon expeditious disposition of all related litigation (Petitioner's App. 76, ¶108) — is trying to filibuster the project to death by extending the appellate process for the maximum number of days permitted by Court rules.[2]

In this action the Commonwealth Court of Pennsylvania affirmed the decision of the Court of Common Pleas on two grounds: (1) the Township's ordinances were preempted by the Pennsylvania Solid Waste Management Act insofar as they regulated the operational aspects of solid waste disposal facilities; and (2) the ordinances constituted improper spot zoning. Petitioner misleadingly suggests that the reliance of the Commonwealth Court upon a spot zoning analysis was improper because the issue of spot zoning had not been explicitly raised at trial. To the contrary, all elements supporting the Commonwealth Court's conclusion were fully litigated at trial and emerged from trial as Findings of Fact.

The trial court's Findings of Fact established that initially, until mid-April 1985, petitioner Township supported the proposal for location of the County's facility on County-owned land within the Township, and the Township Council approved an

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1. The Supreme Court of Pennsylvania has twice refused to consider the same question now raised by the Township.

2. It is evident that the simple Petition before this Court, citing only four cases, was prepared by the Township in a few days. The title and signature pages of the Petition list Arthur Lefkoe as counsel for the petitioner Township. When the Supreme Court of Pennsylvania issued its Order refusing to reconsider its denial of allocatur on November 28, 1988, Mr. Lefkoe was the Township Solicitor, but the Township Council relieved Mr. Lefkoe of those duties on January 3, 1989. It therefore appears that the Township's instant Petition was prepared and printed by January 3, 1989, but was deliberately withheld from filing by the Township for at least 51 days, until February 23, 1989, so that the Township could stretch the appellate process to the greatest extent permitted.

ordinance creating a "resource recovery [zoning] district" that would accommodate a waste-to-energy facility of the magnitude and design proposed by the County. (Petitioner's App. 61-65, ¶¶48, 50-56). Only two weeks after that ordinance was approved, however, the Township Council repealed it on spurious grounds in capitulation to what the trial court described as "intense political pressure." (Petitioner's App. 65-66, ¶¶57-59).

On July 8, 1985, after indicating that it was now opposed to the location of any kind of solid waste disposal facility in the Township, the Township Council approved three new ordinances which, according to the trial court, constituted a zoning "scheme" designed "for the purpose of keeping all resource recovery facilities out of the Township." (Petitioner's App. 66-69, ¶¶62-71).

As the Township has acknowledged at page 3 of its Petition, the issue of the trial court's jurisdiction was fully litigated by the parties at trial. Within the context of the jurisdictional issue, the parties contested the question of whether the Township had demonstrated such pervasive bias that it would have been futile to require the County to submit zoning applications to the Township. As demonstrated by colloquies among the parties and the court during trial, the Township was fully aware that factual issues relating to bias would be litigated, and the Township's counsel even insisted that he be given an opportunity to present testimony that would refute the County's evidence of bias. (Respondent's App. 1-3). Following the introduction of testimony and exhibits on that issue, the trial court concluded that the Township's conduct demonstrated "the inexorable opposition of the Township to the County resource recovery facility." (Petitioner's App. 74-75, ¶¶98-103)

The Commonwealth Court relied upon the trial court's factual findings of bias in ruling that the Township's July 8, 1985 ordinances constituted an impermissible scheme of spot zoning. Given the Township's bias against placement of a resource recovery facility within its borders, the Commonwealth Court held that "the unavoidable conclusion is that the zoning provisions in this case are classic examples of spot zoning — zoning provisions adopted to control the use of a specific area of land

without regard to the relationship of those land use controls to the overall plan and the general welfare of the community." (Petitioner's App. 16). Accordingly, the Commonwealth Court held that the ordinances were invalid. (Petitioner's App. 17-18).

It is clear, therefore, that the Commonwealth Court's reliance upon a spot-zoning analysis as one of two grounds for affirming the trial court's holding was based not upon some flight of fancy that was unanticipated by petitioner Township, but upon Findings of Fact reached by the trial court after full litigation by both the Township and County. The Township had ample opportunity to litigate the issue of bias that formed the basis for the Commonwealth Court's holding, and the Township fully availed itself of that opportunity. The Township cannot now complain that it was denied due process.

## II. REASONS FOR DENIAL OF THE WRIT

### A. The Commonwealth Court Properly Based Its Spot Zoning Analysis Upon Facts Found By The Trial Court And Fully Litigated By The Parties.

In this case the Commonwealth Court's spot zoning analysis was based entirely upon the application of settled Pennsylvania law to facts culled from the comprehensive record compiled by the trial court on the history of the Township's legislative enactments and bias. The Township had full notice, both before and during trial, of all factual issues raised by the County. The Township then demanded and received in open court the opportunity to litigate the factual grounds cited by the Commonwealth Court (Respondent's App. 1-3), and the Township vigorously contested the factual premises advanced by the County. Accordingly, the Township unquestionably was afforded due process with regard to the development of those facts. The Township does not contest this proposition.

**B. The Commonwealth Court Was Empowered To Affirm The Trial Court Upon Any Grounds Supported By The Record.**

Decisions within the last two decades by federal and Pennsylvania appellate courts establish beyond dispute that petitioner Township suffered no denial of due process when the Commonwealth Court of Pennsylvania affirmed the decision of the trial court upon a determination, *inter alia*, that the Township's ordinances constituted improper spot zoning, even though the spot zoning question had not been considered by the trial court.

This Court has explicitly declined to state a rule as to when an appellate court may resolve an appeal on grounds that had not been considered by the trial court. In fact, this Court stated: "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S. Ct 2868, 2877, 49 L. Ed. 2d 826, 837 (1976).[3]

Every federal appellate court that has considered this question has held that it could affirm the decision of a district court on any ground supported by the record, even if that ground was not mentioned by the district court. *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987); *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362 n.3 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S. Ct. 948, 93 L. Ed. 2d 997 (1987); *Johnson v. Orr*, 776 F.2d 75, 83 n.7 (3d Cir. 1985), *cert. denied*, 479 U.S. 828, 107 S. Ct. 107, 93 L. Ed. 2d 56 (1986); *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985); *Stoetzel v. Continental Textile Corp. of America*, 768 F.2d 217, 222 (8th Cir. 1985); *Estate of Whitt v. Comm'r of Internal Revenue*, 751 F.2d 1548, 1558 (11th Cir.), *cert. denied*, 474 U.S. 1005, 106 S. Ct. 523, 88

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3. Prior to *Singleton*, this Court had taken the position that a correct trial decision should be affirmed, even if the lower court "relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S. Ct. 154, 158, 82 L. Ed. 224, 230 (1937), *reh'g denied*, 302 U.S. 781, 58 S. Ct. 478, 82 L. Ed. 603 (1938).

L. Ed. 2d 456 (1985); *Doe v. Anr'g*, 728 F.2d 30, 32 (1st Cir. 1984); *Seattle Times Co. v. Seattle Mailer's Union No. 32*, 664 F.2d 1366, 1369 n.2 (9th Cir. 1982); *Reynolds v. United States*, 643 F.2d 707, 710 (10th Cir.), *cert. denied*, 454 U.S. 817, 102 S. Ct. 94, 70 L. Ed. 2d 85 (1981); *Mims v. Board of Education of Chicago*, 523 F.2d 711, 716 n.2 (7th Cir. 1975). The appellate courts of Pennsylvania consistently have adopted the same view, holding that they may affirm on any ground supported by the record, regardless of whether that ground was expressed by the lower court. *E J. McAleer & Co., Inc. v. Iceland Products, Inc.*, 475 Pa. 610, 613 n.4, 381 A.2d 441, 443 n.4 (1977); *Gwinn v. Kane*, 465 Pa. 269, 279 n.12, 348 A.2d 900, 905 n.12 (1975); *Dept. of Public Welfare v. Dauphin County Social Services for Children and Youth*, 90 Pa. Commw. 295, 299, 495 A.2d 214, 216 (1985).

This unbroken line of federal and Pennsylvania authority establishes that the Township's due process rights do not include a privilege to contest every conceivable legal theory that the appellate courts might apply to the facts developed at trial. Once the Township availed itself of the opportunity to litigate factual issues, it had received full due process. There is no constitutional reason for this Court to permit the Township to extend this litigation into the next decade by returning this case to the Commonwealth Court for further argument on legal holdings, particularly when those holdings were based upon factual findings which the Township helped create.

The cases cited by the Township do not support its position. In *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), cited by the Township at pages 6-7 of its Petition, this Court invalidated statutes that permitted seizures of a person's possessions upon a creditor's *ex parte* application to a court. Under those statutes, the debtor had *no* opportunity to be heard until after deprivation of his property interest. As the procedural history here demonstrates, the Township was afforded complete notice of the factual issues to be contested, participated in a full hearing before the trial court ruled, and was not deprived of any property interest as a result of the trial court's decision. Likewise, *Willner v. Committee on Character*

*and Fitness*, 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963), cited by the Township, is factually inapposite. In *Willner*, the defendant Committee denied the plaintiff admission to the bar on grounds that his character was questionable, without ever granting the plaintiff a hearing so that he could rebut the allegations. Similarly, in *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948), Michigan systematically allowed conviction on contempt charges without affording the defendant any right to contest the charges against him.

The last case relied upon by the Township, *Holt v. Virginia*, 381 U.S. 131, 85 S. Ct. 1375, 14 L. Ed. 2d 290 (1965), did not involve a due process question. Instead this Court employed a Sixth Amendment analysis in overturning contempt convictions of two attorneys who had offended the trial court with language contained in a petition they had filed.

Petitioner Township has cited no cases that are even remotely analogous to the case at bar. The Township has no legal basis upon which to contend that an appellate court offends due process when it affirms relying in part on a ground which is new but is premised on facts which were developed by the trial court at a full adversarial hearing. Indeed, it is well settled under federal and Pennsylvania law that the Commonwealth Court was entitled to do precisely what it did — affirm by relying in part on grounds that were not argued below but which were supported by the factual record before it. This is not a case in which this Court should grant a writ of certiorari.

## III. CONCLUSION

The Commonwealth Court of Pennsylvania adhered to settled federal and Pennsylvania law by affirming in reliance upon detailed Findings of Fact made by the trial court. Regardless of whether one of the legal theories for affirmance had not been argued before the trial court, the Commonwealth Court was entitled to affirm on any ground supported by the record. Petitioner Township was afforded due process in adversarial proceedings before the trial court, during which the facts relied

upon by the Commonwealth Court were determined. Accordingly, there is no reason for this Court to grant a writ of certiorari to review the judgment of the Commonwealth Court.

Respectfully submitted,

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# APPENDIX

"MR. LEFKOE: May I interrupt at this time? It's obvious that I have admitted that these facts existed by my response to the Request for Admissions; however, my objection is on the grounds of relevancy. These matters run to the estoppel issue which issue is not in the preemption case which your Honor is hearing.

* * *

If you remember the stipulation which was submitted, your Honor, as a result of that conference, it was limited to the preemption issue. This cannot by any stretch of the imagination be included in the preemption issue.

MR. KAUFFMAN: I must respectfully disagree, your Honor, because if you recall just a couple of hours ago when we had a conference in chambers, Mr. Lefkoe said that he was not stipulating to the bias of the council and that it was something that we had to prove. If this doesn't go to the bias of the council, I can't imagine anything that would.

In April they passed an Ordinance which goes along with everything which Mr. Wurzbach has said is fine and we will go along with it, and then they get the NIMBY syndrome and they rescind the Ordinanee which would have permitted everything the county wanted to do: Twelve hundred tons a day, a height of one hundred sixty-five feet, using all of the county's land or seventy acres of the county land, and then they get the political repercussions in the township, rescind this Ordinance, and pass another one which limits the county to ten acres, cuts the tonnage capacity to two hundred fifty instead of twelve hundred tons and lowers the height limitation from one hundred sixty-five feet to forty feet.

Then they want to argue to this Court that we should go back to this council and expect them to give us any relief before we come to Court.

* * *

MR. LEFKOE: If that is an issue of bias and prejudice then we have opened the door to everything in the world, your Honor.

The issue is not what prior Ordinance had been adopted and what Ordinance had been repealed, but what was the Ordinance in effect when the county finally made its move and was the county's planned facility in violation of our Ordinance.

The bias and prejudice is as to whether the township council can and will give the county a fair hearing on a curative amendment if the county chose to go that route, which they haven't done in almost a year, or whether this indicates bias and prejudice on the part of the Zoning Hearing Board if under the Municipalities Planning Code the county chose to go that route which they haven't done in almost a year. I don't see that anything that happened in connection with the adoption and repeal of the Ordinance in April of 1985 goes to those facts at all.

THE COURT: Well, if it opens the door, it opens the door. I hope it doesn't.

I am going to permit it. I think it is a matter of argument as to how I should interpret these various procedures, so I will permit it as being on the issue of bias and prejudice and not estoppel.

MR. KAUFFMAN: Thank you, your Honor.

MR. LEFKOE: I hope that in view of the admissions of some of these documents — and I consider D-7 to be in this same category — that your Honor will give me latitude when Mr. Wurzbach comes back on the stand tomorrow to have him rebut some of these matters.

THE COURT: Tomorrow we will see what the situation is when he comes back and if anything has to be explored further, we will do it." [Commonwealth Court Record at 582a - 585a].

* * *

* * *

"MR. KAUFFMAN: Defendant's Exhibit 13, Your Honor, is a letter from Mr. Lefkoe to the Council of Plymouth Township dated June 7, 1985, which is stipulated to as authentic.

* * *

MR. KAUFFMAN: Further, your Honor, I think it is very solidly on the issue of bias. When a governmental body is advised by its Solicitor that what they are about to do is illegal and they do it anyhow, it shows the length to which they will go

to exercise the results of their own bias against this particular project.

* * *

MR. KAUFFMAN: I would like to read Paragraph 3, your Honor.

THE COURT: Go ahead. read it.

MR. KAUFFMAN: 'The limitation of tonnage for trash transfer stations may well be held by a court to be illegal and invalid as an improper exercise of zoning power bearing no reasonable relationship to the public health and welfare. If the business was an otherwise permitted use, would a restriction on the number of deliveries, shipments, tonnage manufactured or processed be valid? I think not.'

I think this is relevant to the issue of bias." [Commonwealth Court Record at 600a - 601a].